Diversey (Far East) Pte Ltd v Serba Pakar Kimia Sdn Bhd

HIGH COURT (KOTA KINABALU) — APPLICATION FOR EXECUTION NO K22 OF 1991 (SUIT NO K1018 OF 1987)
SYED AHMAD IDID JC
27 SEPTEMBER 1991

Civil Procedure *— Execution — Application to set aside writ of seizure and sale — Whether written permission of Controller of Foreign Exchange had to be obtained by judgment creditor — Whether proceeds of execution could be paid into court — Exchange Control Act 1953 s 8 & Sch 4 cl 1*

The plaintiff/judgment creditor obtained a writ of seizure and sale against the defendant/judgment debtor. The plaintiff then seized the defendant's vehicle. The defendant applied to the High Court for a stay of the writ of seizure and sale or alternatively to set aside the writ. The defendant argued, inter alia, that the plaintiff had not complied with the Exchange Control Act 1953 because no written permission from the Controller of Foreign Exchange had been obtained. Accordingly, the defendant alleged that the writ could not be sealed. The defendant also argued that the plaintiff's execution of the writ was mala fides and an abuse of the process of the court.

Held, dismissing the defendant's application:

(1) There was no mala fide on the plaintiff's part as the steps taken by the plaintiff were in furtherance of a court order. Nor was there an abuse of the process of the court when the plaintiff acted in obedience to a court order.

(2) Section 8 of the Exchange Control Act 1953 prohibits persons from making payment to a person resident outside Malaysia. The defendant was thus prohibited by s 8 from making payment. However, even if permission from the Controller had not been obtained, under cl 1 of Sch 4 of the Exchange Control Act 1953, the writ could direct the sheriff who carried out the seizure to pay the proceeds of the execution into court. Before the money could be released to the plaintiff, the requisite permission should be obtained under O 22 r 19 of the Rules of the High Court 1980. The plaintiff's execution of the writ was therefore not illegal.

[Bahasa Malaysia summary

Plaintif/pemiutang penghakiman telah mendapat satu writ penyitaan dan penjualan terhadap defendan/penghutang penghakiman. Plaintif kemudian menyita kenderaan defendan. Defendan memohon kepada Mahkamah Tinggi untuk penggantungan writ penyitaan dan penjualan atau sebagai alternatif mengetepikan writ itu. Defendan berhujah, antara lain, bahawa plaintif tidak mematuhi Akta Kawalan Pertukaran Wang 1953 kerana tidak mendapatkan keizinan bertulis daripada

Pengawal Pertukaran Wang Asing. Oleh kerana itu, defendan mengatakan bahawa writ itu tidak boleh ditera. Defendan juga berhujah bahawa pelaksanaan writ itu oleh plaintif adalah mala fides dan merupakan penyalahgunaan proses mahkamah.

Diputuskan, menolak permohonan defendan itu:

(1) Tidak terdapat mala fides pada bahagian plaintif kerana langkah-langkah yang diambil oleh plaintif itu adalah berikutan daripada perintah mahkamah. Tidak juga terdapat penyalahgunaan proses mahkamah apabila plaintif bertindak mematuhi perintah mahkamah.

(2) Seksyen 8 Akta Kawalan Pertukaran Wang 1953 melarang orang-orang daripada membuat pembayaran kepada seseorang yang bermastautin di luar Malaysia. Defendan dengan itu dilarang oleh s 8 daripada membuat pembayaran. Akan tetapi, sekalipun keizinan daripada Pengawal itu tidak diperolehi, di bawah fasal 1 Jadual 4 Akta Kawalan Pertukaran Wang 1953, writ itu boleh mengarahkan syerif yang menjalankan penyitaan itu untuk membayar hasil pelaksanaan itu ke dalam mahkamah. Sebelum wang itu boleh dilepaskan kepada plaintif, keizinan yang diperlukan harus diperolehi di bawah A 22 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980. Pelaksanaan writ itu oleh plaintif oleh kerana itu tidak menyalahi undang-undang.]

Legislation referred to

Courts of Judicature Act 1964 s 73
Exchange Control Act 1953 ss 8, 36, Sch 4 cll 1, 2, 3
Rules of the High Court 1980 O 2 r 1(1), O 45 r 11, O 46 rr 4(4)(a)(iii), 5(1), O 47 rr 1(a), 2(1)

Nancy Tan (*Shelley Yap Leong Tseu Chong Chia & Co*) for the plaintiff.
Ronny Cham (*Ronny Cham & Co*) for the defendant.

Syed Ahmad Idid JC: On 6 June 1991, the defendant/judgment debtor filed a summons-in-chambers and applied for several orders, ie:

(i) that the writ of seizure and sale be stayed, or set aside or struck out;
(ii) that the defendant's/judgment debtor's vehicle SA 9263 C be released and that the plaintiff/judgment creditor do pay damages; and
(iii) that costs be defendant's/judgment debtor's costs.

A certificate of urgency dated 29 May 1991 was filed and signed by one Ooi Kim Ean.

The grounds advanced in the application to stay or set aside or strike out the writ of seizure and sale were that:

(a) its execution was irregular, defective, wrongful and an abuse of the process of court;
(b) its execution was illegal and contravened the Exchange Control Act 1953;

(c) an application had been made earlier under O 45 r 11 for a stay of the judgment;
(d) the defendant/judgment debtor had filed an appeal to the Supreme Court; and
(e) the execution of the writ was mala fides.

The summons-in-chambers was applied for under O 47 r 1 which permits the stay of execution by writ of seizure and sale (O 47 r 1(a)) if there are special circumstances which render it inexpedient to enforce the judgment or order. Miss Nancy Tan was correct to observe that O 2 r 1(1) was on the effect of non-compliance and that any irregularity shall not nullify ... the judgment or order. It must, however, be added that the summons-in-chambers did not challenge the validity of the judgment or order.

Are there sufficient grounds for the court to stay or set aside or strike out the writ of seizure and sale? The judgment debtor not only applied to stay the execution but (and these are *not* in O 47 r 1) asked also to have the writ of seizure and sale 'set aside or struck out'. In support was read out the affidavit by Chai Meng Ching @ Mickey Chai who is the director of the defendant's/judgment debtor's company. According to the certificate of urgency, the plaintiff had seized the defendant's/judgment debtor's Nissan Wagon vehicle No SA 9263 C on 25 May 1991.

Did this seizure render it inexpedient to enforce the judgment or order? I cannot think so but let us see further the grounds which counsel for the judgment debtor had advanced:

(1) the judgment creditor did not comply with the Exchange Control Act 1953 in that it did not comply with ss 8 and 36 or of the Fourth Schedule cll 1 and 3;
(2) as the written permission of the Controller of Foreign Exchange had not been obtained, no such writ can be sealed. Order 46 r 4(4)(a)(iii).

The short answers to both, based on the materials and evidence put before the court, are that:

(i) The Exchange Control Act 1953 does not prevent 'the payment by any person of any sum into any Court in Malaysia'. (Fourth Schedule cl 2). Section 8 of the Exchange Control Act 1953 prohibits *persons* from making payment to a person resident outside Malaysia. The plaintiff/judgment creditor is not such a *person* but the defendant/judgment debtor is. In any case, the defendant/judgment debtor has not made any payment.
(ii) If permission has not been obtained from the Controller, the writ may still be issued directing the sheriff to pay the proceeds of the execution into court. Clause 1 of the Fourth Schedule is relevant. Then the sheriff, in accordance with O 46 r 5, will give notice of any payment into court to the party by whom the writ of execution was issued or to his solicitor. This, in my view, is sufficient to satisfy O 46 r 5(1). See also O 47 r 2(1).
(iii) There is no need to go into the grounds (a) that the plaintiff/judgment creditor knew of the appeal as r 57 of the Rules of the Supreme Court

1980 is clear that 'an appeal shall not operate as a stay of execution of proceedings ...' (see also s 73 of the Courts of Judicature Act 1964 in similar strain); or (b) that there was mala fides because any step taken in furtherance of a court order cannot be so; or (c) that there was abuse of the process of court when obedience to a court order is part and parcel of the legitimate course of action by the plaintiff/judgment creditor.

I accepted that when the plaintiff/judgment creditor executed the judgment, it complied with the Rules of the High Court 1980 as it used the proper forms and by the conditions of sale expressly stating that the proceeds of sale of the said vehicle shall be paid into the court. The execution, therefore, cannot be illegal. In any case, the seizure was made by the sheriff. I can add that before the money can be released to the plaintiff/judgment creditor, the requisite permission should be obtained in accordance with O 22 r 19 of the Rules of the High Court 1980.

I therefore dismiss the defendant's/judgment debtor's summons-in-chambers dated 6 June 1991 with costs.

Application dismissed.

Reported by Wong Kian Kheong